IN THE HIGH COURT OF JUDICATURE OF BOMBAY

APPELLATE SIDE

WRIT PETITION NO. 7257 of 1999

Gajanan Malharrao Deshmukh .. Petitioner

versus

The State of Maharashtra & ors... Respondents

...

Mr.N.V. Bandiwadekar for the petitioner.

Mr.P.M. Patil, AGP for the respondent nos.1 and 2.

CORAM : S.B. MHASE AND

D.G.KARNIK, JJ

DATED : 21st February 2006.

P.C.:

1. By this petition, the petitioner challenges the order dated 23rd July 1999 passed by the Maharashtra Administrative Tribunal dismissing the petitioner’s applications bearing O.A. Nos.501 and 502 of 1998.

2. The petitioner was serving as a Junior Clerk with the respondent since 10th October 1964. He was promoted as a Senior clerk on 14th February 1983. While serving as a Senior clerk, he was suspended from service with effect from 7th May 1987 on account of the criminal case launched against him. Soon after his acquittal in the criminal case, the petitioner was reinstated in service in May 1994 and by a subsequent order the entire period of suspension between 1987 to 1994 was treated as 'period on duty'. The petitioner was to be considered for crossing of the efficiency bar on 1st February 1998 but could not be considered on that day as he was under suspension. Immediately after his reinstatement, his case for crossing of efficiency bar was taken up for consideration and by an order dated 16th July 1998 the Deputy Director, Health Services approved the petitioner's crossing of the efficiency bar with effect from 1st December 1994. i.e. from the year in which he was reinstated. According to the petitioner, it should have been held that he had crossed the efficiency bar from 1st February 1998. Aggrieved petitioner therefore approached Maharashtra Administrative Tribunal (for short 'the MAT') by filing an application bearing O.A.

no.500 of 1998, for declaration that he was deemed to have crossed the efficiency bar on 1st February 1988.

3. Learned counsel for the petitioner submits that for the purpose of crossing of an efficiency bar, a record of five years immediately preceding the date of consideration is required to be taken into consideration. Since the petitioner's case was due for considering for crossing the efficiency bar in the year 1988, record from the year 1982-83 to 87-88 should have been taken into consideration. He submits that out of the said five years the records for the year 1985-86 and 1987-88 only were available and records record for earlier three years were not available as the confidential reports for those years were lost or misplaced. He further submits that though there were adverse entries in the confidential reports for the years 1985-86 and 1986-87, crossing of the efficiency bar could not have been denied to the petitioner on the basis of adverse entries for two years because i) adverse entries were not communicated to him and ii) out of the five years there were adverse entries only for two years and therefore, there were no adverse entries for the majority period of the period of five years. We are unable to accept the submissions for the

reasons mentioned below.

4. It is true that there is no material on record to show that adverse entries for the years 1985-86 and 1986-87 wee not ever communicated to the petitioner. The question therefore is whether the uncommunicated adverse entries can be taken into consideration for considering whether the petitioner was eligible to cross the efficiency bar. In Union of India Vs. V.P. Seth reported in AIR 1994 SC 1261, the Supreme Court has held that the uncommunicated adverse remarks can be taken into consideration for considering whether an order of compulsory retirement of an employee should be passed because compulsory retirement is not a punishment. In our view, the same principle applies for the purpose of crossing of an efficiency bar. Non-crossing of efficiency bar is not a punishment. Crossing of efficiency bar only contemplates that the employee is efficient and deserves to cross the efficiency bar. Decision that an employee is not sufficiently efficient or proficient to cross the efficiency bar is not a punishment. Therefore, relying upon the principle laid down in Union of India Vs. V.P. Seth (Supra) we hold that uncommunicated adverse

entries can be taken into consideration for the purpose of considering whether an employee is fit to cross the efficiency bar.

5. We are unable to accept the second submission that for the purpose of crossing of an efficiency bar, it would be enough that there were no adverse entries for majority of the times out of the period of five years for which the records of an employee are to be considered. Crossing of an efficiency bar depends upon the employee being efficient and proficient in his work. If the employee is found to be not proficient, even for one or two years out of the five years under consideration, the employer may consider that the employee is not fit enough to cross the efficiency bar. It is pertinent to note that no malafides are alleged against anybody in coming to the conclusion that petitioner was not fit to cross the efficiency bar. The record shows that the case of the petitioner was taken up for consideration immediately after his suspension was revoked and he was allowed to cross the efficiency bar with effect from 1st December 1994. He was permitted to cross the efficiency bar retrospectively from the year in which he was reinstated. If the employer thought that the employee

was not doing any work being under suspension and his confidential reports available for immediately preceding years were adverse then he was not fit for crossing of an efficiency bar, that decision cannot be said to be in any way erroneous.

6. Learned counsel for the petitioner relies upon a Government circular dated 1st February 1996. The copy of the circular is not annexed to the petition and is sought to be handed in at thehearing. It would be difficult to rely upon the unauthenticated copy which was not even served on the respondents. Secondly, we are of the view that the said circular is not applicable because the case of the petitioner was to be considered for crossing the efficiency bar in the year 1988 and according to the petitioner he should have been allowed to cross the efficiency bar in the year 1988 itself. Therefore on petitioner's own case The circular of the year 1996 cannot apply for the purpose of consideration of crossing of the efficiency bar in the year 1988. The petitioner has been allowed to cross the efficiency bar in the year 1994. i.e. from a date earlier than the issuance of a circular.

7. For these reasons, there is no merit in the

petition which is hereby dismissed with costs. Rule discharged with costs.

(D.G. KARNIK, J) **(S.B. MHASE, J)**